In the Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-1387

JUVENTINO SALINAS MUNOZ, JOSEPH GONZALEZ ALVARADO, SANTIAGO CASIANO, JR.,
Petitioners

vs.

THE UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioners, JUVENTINO SALINAS MUNOZ, JOSEPH GONZALEZ ALVARADO and SANTIAGO CASIANO, JR., respectfully pray that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Fifth Circuit, entered in this proceeding on February 8, 1979.

OPINION

The Decision of the United States Court of Appeals for the Fifth Circuit on original submission, by written opinion, affirmed an order of the Trial Court (A-1), denying motions to dismiss on grounds of double jeopardy.

QUESTION PRESENTED

That a second indictment for the same offense does constitute double jeopardy after a jury for the first charge was selected and the trial was delayed so other defendants could plead and testify.

STATEMENT OF THE CASE

Petitioners were first indicted on September 13, 1977, in the company of some twenty (20) other defendants for marijuana offenses. After pre-trial hearings, a jury was selected on January 6, 1978, for the trial of these three (3) defendants. All of the other defendants had pled guilty in late December under Rule 11(e), F.R.C.P. The Trial Court, after selection of the jury on January 6, 1978, did not swear the jury though it fully instructed them and set the case for trial in February, 1978.

Approximately six (6) days before the trial was scheduled to commence the prosecution obtained a new indictment charging petitioners with the same offense, and ex parte moved the Trial Court to dismiss the instant indictment, suspend the trial and dismiss the jury. Petitioners filed motions to dismiss by reason of their Fifth Amendment protection against double jeopardy. All of the above facts were stipulated by the parties, approved by the Trial Court and are correctly concluded in the opinion of the Court of Appeals. The Appellants cannot agree with the Trial Judge that double jeopardy did not attach because the jury, though selected and instructed was not sworn by the Trial Judge before recessing the trial for approximately thirty (30) days.

REASONS FOR GRANTING THE WRIT

Petitioners believe that a jury, once officially and lawfully selected, becomes an instrument of due process which can only be dismissed by order of the Court on agreement of all parties. To allow the prosecution to unilaturally have the option tc discard a jury already selected, by dismissing and refiling the identical case is violative of due process of law. This amounts to an unfair advantage that the Government has and which the accused does not have.

Once a jury is selected it becomes a de-facto officer of the Court and the failure to swear them before a lengthy recess should not be a material difference. To continue to hold that a jury must always be sworn before double jeopardy attaches encourages endless reprosecution of helpless defendants and allows the Government the right to discard a jury if it happens not to like that particular jury.

CONCLUSION

For these reasons a Writ of Certiorari should issue to review the opinion of the U.S. Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition for Writ of Certiorari was served upon the Assistant United States Attorney, P.O. Box 1671, Brownsville, Texas, by United States Mail on this the 9th day of March, 1979.

EDUARDO ROBERTO RODRIGUEZ

L. ARON PENA

APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

Enrique GARCIA, Jr., Guadalupe Garcia, Amadeo Uresti Garza, Rogelio Jose De La Garza, Roberto Lopez Hernandez, Juventino Salinas Munoz, Joseph Gonzalez Alvarado, Ramiro Gonzalez Alvardao, Rogelio Arenas, Santiago Casinao, Jr., Ernesto Johnny Gonzalez, Rodolfo Gonzalez, Rogelio Gonzalez, Eliseo Reyes Guerra, Carlos Nieto, Julian Jerrera Mendoza, Natividad Ocanas, a/k/a Villa, Majin Sauceda Reyes, Luis Gumaro Tamez and Pablo Villa, Defendants-Appellants.

No. 78-1657

Summary Calendar.*

United States Court of Appeals,
Fifth Circuit

Feb. 8, 1979

An order of the United States District Court for the Southern District of Texas, at Brownsville, Owen D. Cox, Jr., denied motions to dismiss on double jeopardy grounds. Defendants appealed. The Court of Appeals held that: (1) prosecution does not "jeopardize" defendant for purposes of

*Rule 18, 5 Cir.; *see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al.*, 5 Cir. 1970. 431 F.2d 409, Part I.

the double jeopardy clause until he is put to trial before the trier of facts, and in case of a jury trial, jeopardy attaches when the jury is empaneled and sworn, but in a nonjury trial, jeopardy attaches when the first witness is sworn; (2) where each charge involved proof of fact not required for conviction of the others, offenses of conspiracy to import and to possess marijuana with intent to distribute and the substantive offenses of importation and possession with intent were sufficiently distinct to satisfy requirements of the double jeopardy clause, and (3) a question about the Government's possible use of confidential probationary information in obtaining superseding reindictment was not properly appealable at the point of appeal from the order denying motions to dismiss on double jeopardy grounds.

Affirmed.

1. Criminal Law 173

Prosecution does not "jeopardize" defendant for purposes of double jeopardy clause until he is put to trial before trier of facts, and in case of jury trial, jeopardy attaches when jury is empaneled and sworn, but in nonjury trial, jeopardy attaches when first witness is sworn. U.S.C.A. Const. Amend. 5.

2. Criminal Law 171

Where district judge refused to accept sentence as recommended by Government as part of plea agreement and defendants withdrew their guilty pleas and then, because of superseding indictment for same offenses, district judge granted Government's motion to dismiss original indictment,

second indictment did not place defendants in double jeopardy. U.S.C.A. Const. Amend. 5.

3. Criminal Law 200(6)

Conspiracy is normally sufficiently distinct offense from underlying substantive offense that double jeopardy clause does not bar prosecution of both. U.S.C.A. Const. Amend.5.

4. Criminal Law 200(6)

Where each charge involved proof of fact not required for conviction of the others, offenses of conspiracy to import and to possess marijuana with intent to distribute and substantive offenses of importation and possession with intent were sufficiently distinct to satisfy requirements of double jeopardy clause. U.S.C.A. Const. Amend. 5.

5. Criminal Law 195(1)

Defendant was not placed in double jeopardy by reason of previous trial on similar but different drug charge. U.S.C.A. Const. Amend.5.

6. Criminal Law 177,202(1)

Where previous indictment charged different offense, i.e., conspiracy to distribute drugs, as opposed to importation and possession conspiracies presently charged, and where, also, previous indictment had been dismissed before accused was put to trial before trier of fact, there was no double jeopardy. U.S.C.A. Const. Amend.5.

7. Criminal Law 1023(8)

Question about Government's possible use of confidential probationary information in obtaining superseding reindictment was not properly appealable at point of appeal from order denying motions to dismiss on double jeopardy grounds. U.S.C.A. Const. Amends. 5, 14.

8. Criminal Law 1023(8)

Order refusing to dismiss indictment on double jeopardy grounds was appealable. U.S.C.A. Const. Amend.5.

Appeals from the United States District Court for the Southern District of Texas.

Before GOLDBERG, AINSWORTH and HILL, Circuit Judges.

PER CURIAM.

[1] This is an appeal from the lower court's order denying defendants' motions to dismiss the indictment on the ground the indictment constitutes double jeopardy. The court's order is appealable. *Abney v. U.S.*, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651. Appellees also urge us to decide that their right to due process was violated by the government's alleged use of certain potentially incriminating information which several defendants gave to probation officers in connection with a court-ordered presentence report and a possible plea settlement.

I. The double joepardy claims in this case involve five distinct instances of possible former jeopardy.

[2,3] 1. Appellants were indicted on September 13, 1977 on various drug-related charges. With the exception of Santiago Casinao, Jr., Joseph Gonzalez Alvarado, Jr. and Juventino Salinas Munoz, they negotiated a plea bargain with the government. But when the District Judge refused to accept the sentences recommended by the government as part of the plea agreement, the appellants withdrew their guilty pleas. Then, because of a superseding indictment for the same offenses, the District Judge granted the government's motion to dismiss the original indictment. Appellants now argue that the second indictment places them in double jeopardy.

The law is settled in this area. The Supreme Court has stated consistently that a prosecution does not sufficiently "jeopardize" a defendant for purposes of the Double Jeopardy clause until the defendant is "put to trial before the trier of facts." *United States v. Jorn*, 400 U.S. 470, 479,91 S.Ct. 547, 554, 27 L.Ed.2d 543. In the case of a jury trial, jeopardy attaches when a jury is empaneled and sworn. *Crist v. Bretz*, 437 U.S. 28, 98 S.Ct. 2156, 57 L.Ed.2d 24. In a non-jury trial, jeopardy attaches when the first witness is sworn. *Serfass v. United States*, 420 U.S. 377, 95 S.Ct. 1055, 1062, 43 L.Ed.2d 265. Since the original prosecution in this case did not reach either of these stages, jeopardy had not yet attached and there is no double jeopardy violation. *See also United States v. Jasso*, 422 F.2d 1054 (5th Cir. 1971) (no double jeopardy where defendant was reindicted after government confessed error and moved to vacate original conviction and remand for a new trial).

2. Casinao and Gonzalez Alvarado, also named in the original indictment, did not plea bargain. Their trial was scheduled to begin in February, 1978. The jury was selected on January 6, but was never sworn. Both defendants were named in the second, superseding indictment of January 31, and the trial on the original indictment was cancelled when the Court dismissed that first indictment.

As we said earlier, the Supreme Court has said that jeopardy does not attach in a jury trial until the jury is empaneled and sworn. *Crist v. Bretz, supra.* Since the jury in the trial of these defendants had not yet been sworn, jeopardy did not yet attach in the original prosecution and the second prosecution was not double jeopardy.

[4] 3. Appellant Julian Jerrera Mendoza was tried in 1976 on the charges of importing marijuana and possession marijuana with intent to distribute. He was acquitted on the importation charge and convicted on the possession charge.

In the instant prosecution Mendoza has been charged with, among other things, conspiracy offenses apparently related to the previously prosecuted substantive offenses. While conspiracy is normally a sufficiently distinct offense from an underlying substantive offense so that the Double Jeopardy clause does not bar prosecution of both, *U.S. v. Jasso*, 442 F.2d 1054 (5th Cir.1971), there has been considerable debate in the courts recently about the double jeopardy problem in combined conspiracy and substantive offense prosecutions involving virtually identical elements and evidence. *See, e.g., U.S. v. Austin*, 529 F.2d 559 (6th Cir. 1976), *contra U.S. v. Kearney*, 560 F.2d 1358, 1365, 1367 (9th

Cir. 1977). We note that in our own Circuit a District Court recently decided a version of this question, and that the appeal of that decision is pending. *U.S. v. Cowart*, No. CR 77-200 A (N.D. Ga. 1978), *appeal docketed*, No. 78-5175 (5th Cir. March 6, 1978).

[5] We do not reach that question in this case because we find that the offenses of conspiracy to import and to possess marijuana with the intent to distribute and the substantive offenses of importation and possession with intent are sufficiently distinct, with each involving the proof of a fact not required for conviction of the others, *Blockburger v. U.S.*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), to satisfy the requirements of the Double Jeopardy clause.

[6] 4. Appellant Tamez, tried in 1974 on a similar drug charge, contends the instant prosecution places him in double jeopardy. We agree with the District Court that the instant prosecution does not violate the Double Jeopardy clause because it does not charge the same offense tried in 1974.

[7] 5. Tamez also claims that an indictment against him in Oklahoma for a related offense makes the instant prosecution double jeopardy.

This claim fails on two grounds. First, the Oklahoma indictment charged a different offense– conspiracy to distribute drugs; as opposed to the importation and possession conspiracies charged in the instant prosecution. Second, the lower court apparently found, based on evidence in the record (R. 142.), that the Oklahoma indictment was dismissed before the accused was put to trial before the trier of fact. This finding was not clearly erroneous.

[8] II. Appellants also raise a serious and factually complex question about the government's possible use of confidential probationary information in obtaining a superseding reindictment. However, this matter is not properly appealable at this point. *Abney v. United States*, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977).

The order of the lower court is affirmed.